Supreme Court, U.S.
FILED
05-624 NOV - 7 2005
No. OFFICE OF THE CLERK

In The Supreme Court of the United States

SOBHY SHEHATA HANA,
Petitioner,

v.

ALBERTO GONZALES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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November, 2005

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QUESTION PRESENTED

I. Whether Petitioner's due process rights were violated where his attorney failed to apply for a waiver of removal under INA § 237(a)(1)(H) when Petitioner was prima facie eligible for a 237(a)(1)(H) waiver?

PARTIES AND COUNSEL IN PROCEEDINGS BELOW

Sobhy Hanna	Alberto Gonzales/INS
Represented by:	Represented by:

Immigration Court:

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Board of Immigration Appeals

Scott Bratton/Margaret Wong Margaret Wong & Associates 3150 Chester Ave. Cleveland, Ohio 44114	same as Immigration Court

Sixth Circuit Court of Appeals:

Scott Bratton/Margaret Wong	Jennifer Paisner; Jamie Dowd; David Bernal Office of Immigration Litigation US Dept. of Justice PO Box 878, Ben Franklin Station Washington, DC 20044

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OPINION BELOW

The opinion of Court of Appeals for the Sixth Circuit was entered on April 18, 2005, under the caption Hanna v. Gonzales, Nos. 03-3550; 04-3065 (6th Cir. 2005)(unpublished). The decision is attached hereto as Appendix B. Petitioner filed a timely Petition for Panel Rehearing only in the 04-3065 case. The Petition for Rehearing was denied on August 9, 2005. The Order is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 18, 2005. The Sixth Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on December 17, 2003.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed within 90 days of the date the Petition for Rehearing was denied. The instant Petition is only being filed with respect to the 04-3065 case. Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

INA § 237(a)(1)(H):

"Waiver authorized for certain misrepresentations.

—The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) (I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and 237(a)(1)(H)(i)(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(ii) is an alien who qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B).

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation."

Fifth Amendment to the U.S. Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in the instant case to address a circuit split with respect to the issue of whether an alien is entitled to reopening based on ineffective assistance of counsel where counsel's actions deprive an alien of the opportunity to apply for discretionary relief from removal. In the instant case, Petitioner was deprived of an opportunity to apply for a waiver under INA § 237(a)(1)(H) due to counsel's failure to request this relief from removal. However, the Sixth Circuit held that an alien cannot raise a claim of ineffective assistance of counsel where counsel's ineffectiveness relates to discretionary relief from removal. The Sixth Circuit's decision is inconsistent with decisions of the Second and Ninth Circuits, which have allowed for reopening of a removal case where an alien was deprived of effective assistance of counsel due to counsel's actions in preventing the alien from reasonably presenting her case. See e.g. Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000); Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002); Rabiu v. INS, 41 F.3d 879 (2d. Cir. 1994); But see Mejia-Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999)(no due process violation where the ineffective

assistance of counsel related to discretionary relief); Natavi-Gomez v. Ashcroft, 344 F.3d 805 (8th Cir. 2003)(same); Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001)(same).

Petitioner contends that an alien's due process rights are violated where an alien is wholly deprived of an opportunity to apply for relief from removal. The instant case clearly involves an issue of exceptional importance for aliens in removal proceedings who have been adversely impacted by their attorney's failure to pursue relief from removal for which they were eligible. Due process applies to aliens in removal proceedings, which includes the right to the effective assistance of counsel. Due process requires a full and fair removal hearing. Petitioner contends that he has a protected liberty interest to a full and fair hearing, which includes applying for relief from removal for which he is eligible.

The decisions of those courts that have held that an alien cannot raise a claim of ineffective assistance of counsel where the claim relates to discretionary relief fail to recognize that counsel's actions have deprived an alien an opportunity to a full and fair removal hearing. An alien has a protected liberty interest in receiving a full and fair